



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460**

**OFFICE OF THE ADMINISTRATOR
EPA SCIENCE ADVISORY BOARD**

September 25, 2003

MEMORANDUM

SUBJECT: US EPA Science Advisory Board (SAB) Consultation on Suspended and Bedded Sediments– Documentation for Panel Formation Determinations

FROM: L. Joseph Bachman, Ph.D. */Signed/*
Designated Federal Officer
EPA Science Advisory Board Staff Office (SABSO) (1400A)

TO: Vanessa Vu, Ph.D.
Director
EPA Science Advisory Board Staff Office (SABSO) (1400A)

THROUGH: Daniel Fort */Signed/*
SAB Ethics and FACA Policy Officer
EPA Science Advisory Board Staff Office (SABSO) (1400A)

This memo addresses the set of determinations that are necessary for forming a Science Advisory Board Panel. It provides background information on this SAB activity and then addresses:

- 1) the charge developed for the panel;
- 2) the type of Panel that will be used to conduct the activity, the name of the Panel, and identification of the Panel Chair; the types of expertise needed to address the charge;
- 3) identification of parties who are potentially interested in or may be affected by the topic to be reviewed;
- 4) whether the charge involves a Particular Matter and how conflict of interest regulations under 18 U.S.C. 208. apply to members of the panel;
- 5) how regulations concerning “appearance of lack of impartiality” under 5 C.F.R. 2635.502 apply to members of the panel;
- 6) how individuals were placed on the “Short List” posted on the SAB website as candidates for the panel; and
- 7) how individuals were placed on the final panel.

This memo serves to document the status of decisions on each of these topics and to document the SAB Staff Office Director's approval of those decisions.

A. Background

The Ecological Processes and Effects Committee (EPEC) of the EPA Science Advisory Board was asked by the Health and Ecological Criteria Division of the Office of Science and Technology, Office of Water, to provide a consultation on potential approaches for a strategy for developing water-quality criteria for Suspended and Bedded Sediments (SABS). A request for nominations for consultant panel members to provide additional expertise to EPEC appeared in the *Federal Register* on July 30, 2003 (68 FR 44758-44760; See Attachment 1).

In 1976, EPA issued a water quality criteria recommendation under the Clean Water Act for solids and turbidity. For a variety of reasons, the States seldom, if ever, use this criterion. It is questionable whether this criterion would achieve intended protection for all different designated uses for water bodies. SABS occurs naturally in streams in a wide range of concentrations – levels that might be perfectly normal in one water body would be indicative of impairment in another.

Although most States currently have water quality criteria that can be applied to manage SABS, these are typically based on turbidity, suspended solids or settleable solids, and their effectiveness for dealing with all water quality impairments caused by SABS, especially as benchmarks for aquatic life protection based on natural levels, is questionable. In recent consultation with State representatives, the need for new water quality criteria for SABS or methodologies for deriving them on a site-specific basis was identified as one of the highest priorities for the water quality criteria program. As a result, the EPA Office of Water has concluded that to better manage SABS in all types of water bodies and for all designated uses, State and Tribal water quality managers need new and updated water quality criteria and information for SABS.

B. Determinations

1) The charge to the panel: SAB Staff and the Agency negotiated the following charge:

While many questions and much research remain, EPA seeks the opportunity for a consultation with the Science Advisory Board to gain advice and recommendations on the best potential approaches to developing water quality criteria for suspended and bedded sediments as will be described in a draft Strategy for Developing Water Quality Criteria for Suspended and Bedded Sediments (SABS) to be prepared by the Office of Water. The Office of Water is also seeking recommendations on additional criteria development and approaches for uses of water bodies other than aquatic life, and it is also seeking advice on any potential criteria derivation methodology not included in the Strategy.

2) Type of Panel that will be used to conduct the review, the name of the Panel, and identification of the Panel Chair; types of expertise needed to address the charge: A panel of the SAB's Ecological Processes and Effects Committee (EPEC), called the "Panel on Suspended and Bedded Sediments" will conduct the consultation. The EPEC Chair, Dr. Virginia Dale, will

chair the panel. The EPEC contains experts in various fields of ecology, hydrology and sediment transport and is the natural venue at the SAB for this consultation. The SAB, in its July 2003 FR Notice cited above asked for additional experts to augment the EPEC in its consultation. In the FR notice, the Board requested nominations in the following areas: (a) fluvial hydrogeomorphology; (b) fluvial habitat dynamics; (c) sediment and turbidity monitoring; and (d) fisheries biology.

3) Identification of parties who are potentially interested in or may be affected by the topic to be reviewed: Entities whose activities involve the substantial release of suspended sediment, including, but not limited to the construction industry and agriculture. Entities that support or earn income from aquatic commercial or recreational activities that might be affected by sediment concentrations, including, but not limited to commercial fishing, sport fishing, navigation, and diving.

Other interested parties are those who follow water-quality criteria developments, because they see development of the water-quality criteria for SABs as a possible precedent for EPA's implementation of water-quality criteria for constituents that occur naturally at a wide range of concentrations.

4) Whether the charge involves a Particular Matter

The term "particular matter" refers to matters that involve deliberation, decision, or action that is focused on the interests of specific people or a discrete and identifiable class of people. The term may include matters that do not involve formal parties and may extend to legislation or policy-making that is narrowly focused on the interests of a discrete and identifiable class of people. But the term does not cover consideration or adoption of broad policy options directed to the interests of a large and diverse group of people. [5 C.F.R. 2640.103(a)(1)]

A particular matter has a direct effect on a financial interest if a close causal link exists between any decision/action to be taken in the matter and any expected effect of the matter on the financial interest. An effect may be direct even though it does not occur immediately. A particular matter does not have a direct effect on a financial interest, however, if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter. A particular matter that has an effect on a financial interest only as a consequence of its effects on the general economy is not considered to have a direct effect. 5 C.F.R. 2640.103(a)(3)(i).

The Director of the Science Advisory Board Staff Office (as Deputy Ethics Official) and the Ethics and FACA Policy Officer of the Science Advisory Board have determined that this consultation does not constitute a "particular matter" under 18 USC 208. This is because the committee is conducting a consultation and not making recommendations, reaching a consensus or reviewing EPA policy, and because the Agency is not asking for advice about an EPA action or decision that is focused on the interests of specific people or a discrete and identifiable class of people.

5) How regulations concerning "appearance of lack of impartiality" under 5 C.F.R.

2635.502 apply to members of the panel.

According to 5 CFR 2635, “Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the person determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee.”

Further, 5 C.F.R. 2635.502(a)(2) states that, “An employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter.”

Even though circumstances for some specific current or potential panel members may not raise issues of formal COI, nor formal appearance concerns, each candidate will be evaluated against the 5 C.F.R. 2635(a)(2) **general requirements** to ensure that appearance of impartiality issues do not preclude their participation. Information used in this evaluation will come from their EPA Form 3110-48, from specific interviews, and from information that comes from public comments and other staff research. For current or potential members who hold grants, cooperative agreements or contracts, the SAB Staff Office will determine whether the “**reasonable person**” **criterion** is met in the following manner:

- (a) Grants or contracts from the **Office of Water, Office of Science and Technology, Health and Ecological Criteria Division** concerning uncontaminated suspended and bedded sediments;
- (b) Candidates who directly work for major emitters of suspended and bedded sediments.

After conducting an evaluation, the Director of the Science Advisory Board Staff Office (as Deputy Ethics Official) and the Ethics and FACA Policy Officer of the Science Advisory Board have determined that there is no reason to raise any question regarding the appearance of impartiality under 5 C.F.R. 2635.502.

6) How individuals were selected for the “Short List” posted on the SAB website as candidates for the panel. On September 4, 2003, the SAB Staff posted a notice on the SAB website inviting comment on Prospective Candidates for the Panel on Suspended and Bedded Sediments (Attachment 2). That notice stated that SAB staff supplemented the existing membership of EPEC with three additional “Short List” candidates, based upon their expertise, interest, availability, and credentials. SAB Staff selected individuals for the “Short List” based on their established credentials in the technical areas required for the review and described in the SAB *Federal Register* notice.

7) How individuals were selected for the final panel. The SAB received 1 public comment in response to its request for “information, analysis, or documentation” that the Board should consider in making its selection of members of the panel. (Attachment 3 lists the name of the person submitting public comment). This request was received by the time the public

comment period closed on September 24, 2003.

SAB Staff considered this information along with: (a) the Confidential Financial Disclosure Forms completed by all Short List Candidates; (b) responses from Short List candidates to queries about their "points of view" and relationship to the review material to be considered by the panel (Attachment 4); (c) *Curriculum Vitae* provided by candidates and supplementary materials provided by them; and (d) results of an independent World-Wide-Web search conducted on all Short List panel members.

The SAB staff developed a proposed final panel list for the SABS consultation panel for discussion with the Panel Chair, Dr. Virginia Dale. The proposed panel consists of the existing Ecological Processes and Effects Committee, with the exception of Dr. William Mitsch, who is unable to attend, supplemented by the three short-list candidates. This proposal will expand the expertise of the panel to include fluvial geomorphology, fluvial habitat dynamics, sediment and turbidity monitoring, and fisheries biology.

The SAB Staff Director, the DFO, and the SAB Ethics and FACA Policy Officer met in person on September 25, 2002 to discuss the proposal, along with the public comments and other information gathered. The Chair supported the proposal and the Staff Director approved. The Staff Director instructed the DFO to contact panel members to begin work on the review (Attachment 5--Roster of individuals selected for the Panel).

Concurred,

/Signed/

	September 25, 2003
Daniel Fort	Date
Ethics and FACA Policy Officer	
EPA Science Advisory Board Staff Office	

Approved,

/Signed/

	September 25, 2003
Vanessa Vu, Ph.D.	Date
Director	
EPA Science Advisory Board Staff Office	

Attachment 1: *Federal Register* Request for Nominations for the Panel on Suspended and Bedded Sediments on July 30, 2003 (68 FR, 44758-44760)

Attachment 2: Invitation for Comment on Prospective Candidates to the SABS Review Panel

Attachment 3: List of the Name of the person Submitting Public Comment on the SABS Panel Short List

Attachment 4: Questions posted to Short List candidates about their "points of view" and relationship to the material to be considered by the panel

Attachment 5: Roster of individuals selected for the Panel